SUPREME COURT OF THE UNITED STATES.

STANDARD OIL COMPANY (NEW JERSEY), as owner of steamship *Cushing*, Petitioner, *against* SOUTHERN PACIFIC COMPANY, as owner of steamship *Proteus* and others, Respondents.	October Term 1923.

SIRS:

PLEASE TAKE NOTICE that a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit will be submitted to the Supreme Court of the United States at the opening of court on the 22nd day of October, 1923, or as soon thereafter as counsel can be heard.

Dated, New York, October 8, 1923.

Yours, etc.
KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Proctors for Petitioner.

To:
Burlingham, Veeder, Masten & Fearey, Esqs.,
Bigham, Englar & Jones, Esqs.,
Honorable William Hayward, Esq.,
United States Attorney.
Harold J. Roig, Esq.,
Foley & Martin, Esqs.,
Henry O. Falk, Esq.,
Frank M. Patterson, Esq.,
Cohen Brothers, Esqs.,
Edward B. Levy, Esq.,
Proctors for Respondents.

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SUPREME COURT OF THE UNITED STATES.

STANDARD OIL COMPANY (NEW JERSEY), Petitioner, *vs.* SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS, Director General of Railroads, et al, Respondents.	October Term, 1923. No.....

PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Standard Oil Company (New Jersey), respectfully shows unto this Court as follows:

I.

STATEMENT OF FACTS AND MATTERS INVOLVED.

FIRST: Your petitioner is and was at all times hereinafter mentioned a corporation duly organized and exist-

ing under the laws of the State of New Jersey, and the owner of the tank steamship *Cushing*.

SECOND: On December 28, 1917, pursuant to Act of Congress of August 26, 1916, Chap. 418, Par. 1, 39 Stat. 645, and under the Proclamation of the President of December 26, 1917, the steamship *Proteus*, owned by the Southern Pacific Company, was taken into the possession and control of the Director General of Railroads, and was thereafter manned, operated, and navigated at the expense of the Director General of Railroads, under his sole control, including the time of the collision hereinafter mentioned. Vol. I, fols. 102-107. The Director General of Railroads was in legal effect the demise charterer in possession of the *Proteus*, which, unless lost, would have continued under the sole control of the Railroad Administration until March 1, 1920; Transportation Act of 1920, Section 200 (a).

THIRD: On or about August 19, 1918, while the said steamship *Proteus* was in the possession and control of the Director General of Railroads, and manned by its servants, as aforesaid, a collision occurred between the said steamship *Cushing*, and the *Proteus*, with the result that the steamship *Proteus* and her cargo were totally lost.

FOURTH: After the accident, petitions for limitation of liability were filed on behalf of both vessels. The Director General of Railroads as the demise charterer, and as co-petitioner with the Southern Pacific Company, claimed the benefits of its limitation of liability provided by Sections 4283-4286 of the Revised Statutes being

represented on the record by Burlingham, Veeder, Masten, and Fearey; and, Roscoe H. Hupper, Vol I. Fol. 127. Although the Southern Pacific Company was owner of the *Proteus* and a co-petitioner in these proceedings, the real party in interest was the Railroad Administration, because the Railroad Administration had sole possession and control of the steamship *Proteus* as aforesaid and of the two would have been the only party which could properly have been held liable for any damage caused by her loss.

FIFTH: The merits of the collision case were tried out in the United States District Court for the Southern District of New York, and a decision holding both vessels at fault was rendered, with reference to a commissioner to ascertain the damages. Vol. I, pages 509-522; *The Cushing, The Proteus,* 266 Fed. Rep. 570.

SIXTH: The damages were assessed, after extensive proofs before an experienced Commissioner, who heard all the witnesses. The Commissioner awarded "the sum of $750,000, with interest thereon from August 19, 1918, the date of the loss", as the value of the *Proteus,* after considering all relevant facts bearing on the question of "value". Vol. II. Fol. 2544.

SEVENTH: The findings of the Commissioner as to "the value" of the *Proteus* were reviewed on exceptions by the District Court, Circuit Judge Mack sitting; and, after a well-considered opinion, the exceptions were overruled and the Commissioner's findings confirmed. Vol. II, pages 854-862; *The Cushing,* 285 Fed. Rep. 617. Circuit Judge Mack expressly confirmed and adopted the rule as applied by the Commissioner that "all the

relevant facts should be considered'' in arriving at the fair recompense to the owner. Vol. II. Fol. 2568.

EIGHTH: The causes under the limitation proceedings were consolidated by order of the United States District Court of November 6, 1922, Vol. II, pp. 863-864; and final decree was entered in the United States District Court on November 28, 1922. Vol. II. Fol. 2604.

NINTH: The Standard Oil Company (New Jersey) appealed from the final decree on the merits on December 27, 1922, and the Southern Pacific Company appealed from the decree in so far as the value of the *Proteus* was fixed therein, on January 27, 1923. The Director General of Railroads, the real party in interest, did not take any appeal.

The appeals came on to be heard before the Circuit Court of Appeals for the Second Circuit, and that Court, in its opinion handed down July 16, 1923, affirmed the decree of the District Court on the merits, but modified the award for the item of damage representing the value of the steamship *Proteus*, by allowing the sum of $1,225,000 for that item, as against $750,000, which had been awarded by the Commissioner and affirmed by the District Court; that is, the value of the *Proteus* was increased by $475,000, which is an addition of 63⅓% of the original award. The order of that Court to which this petition for certiorari is directed was entered in the Circuit Court of Appeals on July 23, 1923.

TENTH: The high figure which the Circuit Court of Appeals awarded, viz. $1,225,000, was obtained by taking

$1,750,000 as an "estimated cost" of reconstructing the *Proteus* anew, and deducting from it the sum of $525,000, as depreciation at two and one-half per cent per year for the eighteen years of age of the vessel. Vol. II. Fols. 1607-1610.

ELEVENTH: At the time that the collision occurred, the situation was that the Southern Pacific Company as the innocent owner of the *Proteus,* had a claim against the Director General of Railroads for her value at the time of her loss.

That loss has been held to be due in part to negligence of the servants of the Director General of Railroads who were operating her at the time of the collision.

The Southern Pacific Company at the time of the loss had also a claim against the owners of the *Cushing* for the same tort.

Consequently, the apparent line-up of the parties with the Director General of Railroads and the Southern Pacific Company on the one side and the Standard Oil Company on the other side, does not represent a true analysis of the legal relationships.

The real legal relationship is that the Southern Pacific Company had a claim against two parties—the Standard Oil Company (New Jersey) and the Railroad Administration, who together, as the decisions have proved, were joint tort feasors causing the loss of the Southern Pacific Company's steamer *Proteus.*

Since the expiration of the Term of the Circuit Court of Appeals, it has come to the attention of counsel in this case, through proper and reliable sources, that a final settlement had been arrived at between the Railroad

Administration and the Southern Pacific Company by which the liability of the Railroad Administration for the loss of the *Proteus* has been finally satisfied and extinguished by a payment, credit, or adjustment on the basis of the value found by the Commissioner and confirmed by the District Court, namely, $750,000. This settlement was made, the petitioner is informed, between the time of the decision of the District Court and that of the Circuit Court of Appeals.

The situation, therefore, is singular. Because in addition to the ordinary application for a writ of certiorari which is being put forward and had been planned to be put forward by the petitioner, since the decision of the Circuit Court of Appeals for the reasons hereinafter mentioned, a situation exists, it is believed by counsel for the petitioner, in which settlement by the Director General of Railroads with the Southern Pacific Company has extinguished any claim by the Southern Pacific Company against the Standard Oil Company because it is a settled rule of law in admiralty as well as at common law that a settlement with one joint tort feasor of a claim by the damaged party, precludes the continuance of the claim for the same loss by the damaged party against the other tort feasor.

In any event, the Southern Pacific Company should not be allowed to claim from the petitioner more than it has agreed with its demise charterer, the Railroad Administration, as the value of the *Proteus* and the basis for its damages for the loss of the *Proteus* through that charterer's fault.

TWELFTH: The term of the Circuit Court of Appeals for the Second Circuit is held annually. The annual term commences by Rule 3 of that Court on the first day of October in each year. Therefore the term at which the decision in the instant case was made,—the October Term, 1922, of the Circuit Court of Appeals for the Second Circuit,—expired on September 30, 1923.

Owing to the fact that the term of the Circuit Court of Appeals had expired when the facts above adverted to were learned by the counsel for the petitioner, they are not in a position to make any application for relief of any kind in the Circuit Court of Appeals.

Naturally the facts just noted are not included in the Record on Appeal here and the only method by which the petitioner will be able to receive any relief is to have this Court grant a writ of certiorari to review the question of damages for the reasons hereinafter stated and then to provide for the taking of such evidence or the discovery of such documents as may be necessary to establish the precise facts regarding the settlement referred to, in order that this Court may be in a position to determine what legal results may have flowed therefrom.

THIRTEENTH: Certainly it is an extraordinary situation where A having a right against B for the recovery of the value of a vessel sunk by the joint fault of B and C, should agree with B that the value of the vessel is $750,000, and settle accordingly, and then proceed to claim a value of $1,225,000 against C on a claim which must have been extinguished by the act of settlement between A and B.

The situation is so singular that it is respectfully urged that this Court find some way in which to deal with the whole situation on certiorari and enable the petitioner to escape from the certainty, which unless certiorari is granted, it now faces of having to account for $475,000 more for the loss of the *Proteus* than was agreed on as her value between her owner and her tort feasor charterer by whose contributing wrong her loss occurred.

FOURTEENTH: Your petitioner seeks a review of the ruling of the Circuit Court of Appeals as to the award for value of the *Proteus* and thereafter the additional relief above outlined.

II.

REASONS FOR ALLOWANCE OF WRIT.

1. There was not only not any market to establish a "market value" for the *Proteus* at the time of her loss, August 19, 1918, but there was also not any definite standard of reconstruction cost, since it was impossible to reconstruct the vessel at that time, at any cost. II. Fol. 2163. Evidence of the contemporaneous cost of construction is at best speculative, therefore, as applied to the *Proteus*. The rule applied by the Circuit Court of Appeals, which accepted an "estimated" cost of replacement as a basic figure, and reduced it, by an almost equally speculative figure to represent "depreciation" for age, could not but result in a highly fictitious valuation, excluding, as it did, other important factors bearing on the worth of the *Proteus* to her owner. The fairer and more reasonable rule in ascertaining the damages under these circumstances is that applied by the

Commissioner, and by the District Court, namely, that all relevant factors should be considered, and that the one narrow method, which the Circuit Court of Appeals subsequently adopted, should not control exclusively.

The Circuit Court of Appeals erred in arriving at a result by application of an arbitrary formula, based on two uncertain factors, to the exclusion of other material factors of controlling relevance.

2. The questions involved in this case or questions analogous thereto, have been before the Circuit Courts of Appeals for the First, Second, Fourth, Fifth and Ninth Circuits, and the decisions of those courts are not harmonious, as is indicated by the following cases:

The H. F. Dimock (C. C. A. 1st Cir., 1896) 77 Fed. Rep. 226;

The Cushing (C. C. A. 2nd Cir.) decided July 16, 1923;

La Normandie (C. C. A. 2nd Cir., 1893) 58 Fed. Rep. 427;

Whitehurst v. *United States* (C. C. A. 4th Cir., 1921), 272 Fed. Rep. 46;

The J. E. Trudeau (C. C. A. 5th Cir., 1893) 54 Fed. Rep. 907;

The Samson (C. C. A. 9th Cir., 1914) 217 Fed. Rep. 344; 208 Fed. Rep. 347.

The Circuit Court of Appeals for the First Circuit, in the case of *The H. F. Dimock, supra,* discredited the exclusive application of the rule of cost of reproduction, p. 234, and laid down the rule that all relevant facts should be considered, p. 236. The Circuit Court of Appeals for the Second Circuit, in the case of *La Norman-*

die, supra, although holding that "there is no hard and fast rule", proceeded on the foregoing principles as applied in the First Circuit; whereas in the instant case of *The Cushing,* the same court adopted the narrower ruling of reproduction cost. The Circuit Court of Appeals for the Fourth Circuit, in *Whitehurst* v. *United States, supra,* used the original cost of the commodity as the basis of the measure of damage. The Circuit Court of Appeals for the Fifth Circuit, in the case of *The J. E. Trudeau, supra,* while apparently favoring the reproduction theory, with a fixed proportion of one-third off new for old, accepted the ruling of the District Court based on original cost, with an annual depreciation for age. P. 912. The Circuit Court of Appeals for the Ninth Circuit, in the case of *The Samson, supra,* applied the rule of original cost less depreciation for age; and although there was evidence that reproduction cost had increased materially between the time of construction and the loss of the vessel, 208 Fed. 347, p. 352, the reproduction rule later adopted in the instant case in the Second Circuit was disregarded in the Ninth Circuit.

2. It is of great importance that a uniform and reasonable rule should be laid down by this Honorable Court, for ascertainment of the values of ships which have become total losses, and as to which the ordinary rule of market value is not applicable. The necessity for uniformity and agreement in the principles governing these valuations is peculiarly urgent at the present time, because of conditions arising from the requisitioning of substantially all American vessels during the period of the recent war, and extending considerably beyond the cessation of hostilities during which period a large num-

ber of ship casualties have occurred entailing adjudications of values, and affecting not only private shipping interests, by also governmental departments. It is of vital importance that there should be controlling principles for general and harmonious application by the several courts which are now dealing and will hereafter deal with these questions, and similar questions in analagous matters.

3. The peculiar circumstances which have arisen during the pendency of this litigation, as recited in the Eleventh, Twelfth and Thirteenth Articles above, justify a further inquiry into the facts, to determine their legal effect, and their bearing on the measure of damage for which your petitioner may be liable, as to which there is not any relief available except as may be obtained under process of review by this Honorable Court.

WHEREFORE your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to the Supreme Court for its review and determination, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in the said Circuit Court of Appeals in the said consolidated cause entitled "In the Matter of the Petition of Standard Oil Company of New Jersey, as owner of the Steamship *Cushing*, for Limitation of Liability"; and that the said decree of the Circuit Court of Appeals in the said case may be reversed by this Honorable Court, and that your petitioner may have such other and further relief or rem-

edy in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray, etc.

STANDARD OIL COMPANY (N. J.),
By C. T. WHITE,
Secretary.

W. H. MCGRANN,
JOHN M. WOOLSEY,
Counsel for Petitioner.

STATE OF NEW YORK, }
County of New York, } ss.:

C. T. WHITE, being duly sworn, says:

I am the Secretary of the Standard Oil Company (N. J.), a corporation organized under the laws of the State of New Jersey, the petitioner herein; and I have knowledge of this litigation. The foregoing petition, and the matters therein set forth are true, to the best of my knowledge, information and belief.

C. T. WHITE.

Sworn to before me this }
16th day of October, 1923. }

E. A. MANNING,
Notary Public.

[SEAL]

We hereby certify that we have examined the foregoing petition, that in our opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

W. H. MCGRANN,
JOHN M. WOOLSEY,
Counsel.

SUPREME COURT OF THE UNITED STATES.

STANDARD OIL COMPANY OF NEW JERSEY, Petitioner, vs. SOUTHERN PACIFIC COMPANY, and JAMES C. DAVIS, Director General of Railroads, Respondents.	October Term, 1923. No.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT.

This is an application for a writ of certiorari for a review of the decree of the United States Circuit Court of Appeals for the Second Circuit, modifying, and affirming as modified, a decree of the United States District Court for the Southern District of New York.

The material facts and the questions involved are set forth in the foregoing petition.

The question for decision is: What rule of law is to be applied in ascertaining the value of a vessel totally lost where the vessel could not have been sold at the time of loss and no market value could be established, and, also, where the vessel was not replaced and could not

have been replaced at the time by reconstruction, so that a definite reconstruction value could not be established?

The contention of the Petitioner is that the rule of measure of damages under these circumstances should not be that as applied by the Circuit Court of Appeals for the Second Circuit, namely, by accepting an estimated reconstruction cost, and making a reduction therefrom for depreciation, "new for old," which, it is submitted, is not a fair measure of the damage, and is contrary to the decisions in other circuits and to the weight of authority on the subject; but, that the more reasonable and more flexible rule adopted by the Commissioner and the District Court is the proper rule of law applicable, namely, that no one arbitrary method in reaching a figure by mathematical calculation can be used, but that "all relevant facts should be considered" in arriving at the sum to compensate for the loss. Vol. II, fols. 2542, 2543, 2567.

Apart from the question involved in the rule of damage, the circumstances which has been alleged in the eleventh, twelfth and thirteenth articles of the foregoing petition, may be of controlling importance in its legal effect, and warrants an opportunity of proof and a consideration of its relevancy to the matter of award for value of the Proteus.

FIRST POINT.

THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT ERRONEOUSLY APPLIED AN ARBITRARY AND INFLEXIBLE RULE OF DAMAGE, NOT JUSTIFIED BY THE FACTS, AND CONTRARY TO THE RULINGS OF OTHER CIRCUITS, AS WELL AS TO THE WEIGHT OF THE AUTHORITIES.

As has been stated in the foregoing petition, the award of the Commissioner, after he had seen and heard numerous witnesses in a protracted hearing of several months, was fixed in the sum of $750,000 as "sufficient to compensate the claimant for its loss." Vol. II, fol. 2543. That amount was confirmed by Circuit Judge Mack, sitting in the District Court, in his analytical and well-considered opinion of October 17, 1922. Vol. II, pp. 854-862. The Circuit Court of Appeals increased that figure to $1,225,000 by applying its "reproduction" method, which meant the addition of $475,000 to the original awards. This wide difference in the two amounts is sufficient to challenge attention at once, indicating forcefully that one or the other figure is grossly wrong, and that the principles of law applied are commensurately divergent.

The Circuit Court of Appeals stated:

> "Assuming, as claimed, there was no market value in August, 1918, because such steamships could not be purchased because none were on the market or because it was difficult, if not impossible, to obtain a ship builder to construct one, then these special circumstances invoke the rule of damages of cost of production less depreciation." (The word "production" as here used meant "repro-

> duction," that is, building anew, as is shown by the succeeding text of the opinion.)

The Court then, following its conclusion of law as to the rule of damages applicable, adopted the exact figure claimed by the respondents, Southern Pacific Company, namely, $1,225,000, which was the result of a mathematical calculation made by one of its witnesses, who, in his own words, explained the calculation as follows:

> "Q. Mr. Martin, how did you get at this value of $1,225,000? What does it represent? A. *There being no sales to guide me,* I took the *estimated* cost of the reproducing a vessel of the same size and description of the *Proteus* in August, 1918; and the *estimated* cost was $1,750,000. From that cost I deducted two and one-half per cent for eighteen years' depreciation, which is $525,000, leaving a value of $1,225,000." Vol. II, fol. 1609.

The fallacy of this method as applied to the instant case is that the basic figure representing cost of reproduction was as uncertain as would have been an application of a "market value", for the reason that it would have been impossible to build a new *Proteus* at that time, owing to the governmental control of the constructing shipyards, which could not accept and execute private orders. Vol. II, fols. 2161, 2163, 2500, 2501. The inability to establish a market value was due to the same cause, that is, the requisitioning of all American vessels over 2500 tons, and the forbidding of sales of American vessels by the Government. Vol. II, fols. 1603, 1604, 1609, 2561. Since the ordinary rule of market value could not be applied, owing to the fact that there was not a free mar-

ket within the meaning of that rule, for the same reason a "reconstruction value" could also not be properly applied. As the Commissioner stated, the adoption of the estimated reproduction value as a controlling basis of value, would be tantamount to adopting "a purely artificial standard". Vol. II, fol. 2501. The District Court took substantially the same view. Vol. II, fol. 2571.

The case of the *Mersey Docks and Harbor Board and the Lords Commissioners of the Admiralty,* 3 K. B. 1920, and the remarks of Lord Reading from page 223 of the opinion, were quoted by the Circuit Court of Appeals, in support of the application of a reproduction cost; but, the facts of that case show that the Harbor Board actually paid out a sum of money to replace another barge which had been requisitioned while building. There was thus incurred a definite money loss directly due to the requisitioning. That was not the situation here, as there was not any effort made to reproduce the *Proteus,* nor to replace her by purchase of another vessel later. The Commissioner had considered the Mersey Docks case and had distinguished it. Vol. II, fols. 2537-2540.

One of the essential elements in ascertaining the real value of the *Proteus* at the time of her loss was either disregarded or not given due weight by the Circuit Court of Appeals, in applying the inflexible reproduction rule, that element being the requisition status of the *Proteus* which clearly affected her value. There was unrefuted evidence that a requisitioned vessel had less value than a "free" vessel. Vol. II, fol. 1921. The owner of the *Proteus* was prevented from selling or otherwise disposing of the *Proteus* by reason of the requisition, and could not have prof-

ited by such temporarily increased values as may have existed.

In the case of *The Kia Ora* (D. C., E. D. Virginia, September, 1917), 246 Fed. Rep. 143, District Judge Waddill (now Circuit Judge of the Circuit Court of Appeals for the Fourth Circuit), recognized this fact and its bearing on the question of value. The Judge there stated, at page 144:

> "Her value at the time of stranding, under requisition for war purposes, was $1,772,620; if not under requisition, at existing rates, her value would be about $3,000,000."

Also, further, at page 147:

> "The ship's value is variously estimated from $1,772,620 to $3,000,000; the former figure being her estimated worth at this time under requisition, and the latter what she would now be worth, if free from governmental control. For the purpose of reaching a just award, the Court thinks the value may be treated as of the first amount, viz. $1,772,620, though there is much force in libellant's contention as respects its greater value."

It may be noted that the *Kia Ora* was a large British steamship in trans-Atlantic and Australian trade, having a cargo capacity of 11,800 tons, and built in 1907. P. 144.

The Court by adopting the requisition value thus reduced the normal value by more than forty per cent.

In the English case of *Harries* v. *Shipping Comptroller*, 14 Asp. M. C. 320 (May, 1918), the "requistion value" of the vessel was placed at £28,500, and the value free from requisition at £44,300. It was there held that the lower value would be the measure of the damage in total loss by enemy action.

The same principle of value was applied in *Shipping Comptroller* vs. *The Lloyd Royal Belge*, 1 Lloyd's List Reports, 231, 389, King's Bench Division, Commercial Court, November, 1919.

These decisions are pertinent as it is well settled that in matters of commercial law our decisions should conform to the English decisions in the absence of some rule of public policy which precludes our courts from following the English decisions. This was pointed out in the case of *The Eliza Lines*, 199 U. S. 119 at 128, in the opinion of Mr. Justice Holmes.

This element of value of the *Proteus* is one of the "relevant facts" which the Commissioner and the District Court properly considered. Vol. II, fols. 2501-2504, 2565, 2566; but, its effect was clearly without force in the application of the inflexible "reproduction rule" adopted by the Circuit Court of Appeals.

There were a number of such important elements as the preceding, which it is submitted bore materially on the value of the *Proteus*, and as to which evidence had been adduced. Under the rigid rule of damage applied by the Circuit Court of Appeals, these various elements were not taken into consideration, which accounts for the divergency between the extremely high value placed by the Circuit Court of Appeals, and the reasonable yet commensurate value placed by the District Court and the Commissioner. Among these relevant factors may be mentioned:

1. The abnormal, excessive, and transitory values affecting cost of contemporaneous ship construction.

The "reproduction" cost of a new vessel like the *Proteus* as claimed was a *maximum* figure based purely on estimates, namely, $1,750,000. That figure was the

basis of the award of the Circuit Court of Appeals. The District Court properly held that such a valuation would not represent the "fair value" of the *Proteus*. Vol. II, fol. 2574. The District Court cited, as limiting the reproduction theory in important respects, the cases of: *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153, 171, 172; and *Minnesota Rate Cases*, 230 U. S. 352, 452; and concluded that: "* * * reproduction cost, no more than market value, should necessarily be regarded as the ultimate criterion of fair value". Vol. II, fols. 2570-2571.

In the *Minnesota Rate Cases*, 230 U. S. 352, at page 434, the Supreme Court stated:

> "The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."

Also, this Court intimated that a highly transitory market value is not a real test of value, in *United States* vs. *Sage*, 239 U. S. 57, p. 61. To the same effect are: *Lawrence* vs. *Boston*, 119 Mass. 126, 128; *Brown* vs. *Calumet River Railway Company*, 125 Ill. 600, p. 606; *Lanquist* vs. *City of Chicago*, 200 Ill. 69, p. 73. What has been said in respect of "market value" in those cases applies under the circumstances here with equal force to "reproduction cost".

In the case of *Galveston Electric Company* vs. *City of Galveston*, 272 Fed. 147, 157, which was later reviewed by this Honorable Court (April 10, 1922), 258 U. S. 388, the application of transitory values to the determination of the real value of property was not favored. Vol. II, fols. 2570, 2575-2576.

2. The comparatively low first cost of the PROTEUS.

The *Proteus* had cost to build in 1900 the sum of $540,-440, Vol. II, fol. 2178 (not, as assumed by the Circuit Court of Appeals, the sum of $557,600). She had been re-boilered and repaired during 1909, at a cost of $90,000. Vol. II, fol. 1698. (If her boilers lasted only nine years in the first part of her life, she must have been nearly due for re-boilering at the time of her loss in 1918.) The amount invested by her owners in the *Proteus* was therefore about $630,000. She had been employed presumably in earning profits for eighteen years, as returns on the original investment. The award of the Circuit Court of Appeals ($1,225,000.) thus allows the full amount of original investment, plus the large sum of $575,000 representing nearly one hundred per cent additional profit on the investment, without considering the previous profits, and decrease in future expectancy due to age of the vessel. That high valuation was largely due to the somewhat harsh and rigid rule applied, based on "reproduction cost", which the District Court had properly discontinued somewhat, under the authorities previously cited.

If the rule adopted by the Circuit Court of Appeals for the Ninth Circuit, in the case of *The Samson*, 208 Fed. Rep. 347, and (1914) 217 Fed. Rep. 344, of *original* cost less depreciation for age, should be applied here, the value of the *Proteus* would have been found to be less than half of the amount fixed by the Circuit Court of Appeals for the Second Circuit.

3. The considerable age of eighteen years and its obsolescent effect on the value of the PROTEUS.

There was evidence that ship design had improved during the eighteen years' life of the *Proteus,* so that that vessel may be deemed to have been obsolete in some respects. Vol. II, fol. 1745. The so-called "percentage of depreciation" was fixed by the Circuit Court of Appeals in the most favorable terms for the owner, however, without regard to any question of obsoleteness. Indeed, the depreciation used by the owning company was considerably more than that applied by the Court. Vol. II, fol. 2261-2262. The rate of depreciation to be applied on the reproduction theory received consideration of both the Commissioner and the District Court, and the former pointed out the fallacy of such a reduced depreciation as the Circuit Court of Appeals afterwards applied. Vol. II, fol. 2535. The rate of "depreciation" is necessarily a factor in accounting for age, that is, substituting "new for old"; but, it seems that the elements governing the proper rate to be used were not fully considered by the Circuit Court of Appeals, in adopting its most favorable rate for producing high valuation. That factor in the value is necessarily dependent on age, and although the owner of the *Proteus* may have anticipated the maximum life of forty years of the vessel, nevertheless, unquestionably her value in the market would have been very much affected by her age and long use of eighteen years. The annual depreciation percentage finally applied by the Circuit Court of Appeals was a *minimum,* and accordingly favorable to the respondent, Southern Pacific Company. *San Francisco and Portland Steam-*

ship Company vs. *Scott*, 253 Fed. 854; *United States* vs. *Standard Oil Company*, 258 Fed. 696; *The Harmonides*, 1903, Prob. Div. 1. The Courts, in these cases, used from five to six per cent per annum.

4. The special type and special use of the PROTEUS *as a coastwise combined passenger and cargo vessel, and her comparative unfitness for trans-Atlantic cargo carrying, or for general service.*

Peculiarities of construction of the *Proteus* were described by one of the witnesses who was familiar with the vessel at the time she was being built; and it was demonstrated that her efficiency for cargo carriage was very much less than the ordinary type of cargo carrier of the same tonnage. Vol. II, fols. 2055, 2082-2085. That was an element which must have clearly affected the marketability of the *Proteus*, if she could have been sold, and consequently her value at the particular time of her loss. The reproduction rule did not take into consideration this important element of value.

5. The value placed on the PROTEUS *by Southern Pacific Company.*

The Southern Pacific Company was carrying the steamship *Proteus* on its books at a value of $224,986.49, as of August 19, 1918, the date of her loss. Vol. II, fol. 2261. It seems that the practice of the company was to depreciate the values of all their vessels by seventy-five per cent of cost during the twenty years of use. It may be that the value thus stated did not adequately represent the true value; but, it at least was an indication of the owner's view of the vessel value as a part of its cap-

italized property. It seems somewhat inconsistent that with a considered "book value" in the amount stated, the owner should now seek to recover nearly six-fold that value.

6. The insured value of the PROTEUS.

There were enlightening developments in respect of valuation placed on *Comus*, an exact duplicate of the *Proteus*. It was found that the *Comus* had been insured for $690,000, which included also "disbursements", an additional amount to the insurance for hull and machinery. An important feature of this "insured value" as appears in the record, is that the Advisory Board of the War Risk Insurance Bureau had formulated a scale of values of vessels for various purposes, according to which the maximum value of a class of the *Proteus* type would have been about $607,000, namely, $175 per deadweight tonnage less ten per cent for non-classification. Vol. II, fols. 2310, 2312-2319, 2340, 2345-2346, 2357, 2450, 2454. That scale had been formulated during the same month in which the *Proteus* was lost, and as the members of the Board were well-known experts on vessels' values, the schedule thus formulated should have been at least persuasive evidence of the "going values".

In the case of *The Iron Master*, Swab. 443, Dr. Lushington stated as one of the items to be considered in valuing vessels as "the sum at which she was insured"; and that rule had been cited with approval in *The Colorado* Brown Adm., 411, Fed. Cas. No. 3,029, which case was affirmed by this Court, in *The Colorado*, 91 U. S. 692. The English case of *The Harmonides*, (1903) Prob. Div. 1, also approved the rule.

Such evidence was not given any weight, however, in applying the "reproduction" rule here.

7. Value as a going concern at the time of her loss.

It has been held that one element of valuation is "What is her value to the owner as a going concern at the time she was lost." *The Harmonides*, 1903 Prob. Div. 1; Marsden on Collisions at Sea, 6th Edition, p. 119. Factors bearing on this element of value would undoubtedly be the use to which the owner could place the vessel at the time of loss, the profits accruing from that use, the amount of money invested in the venture, and the anticipated profits for continuance of use. A consideration of value from this viewpoint would naturally lead to the effect of the requisitioning, which has been previously discussed, and the continuance of the requisition status, which, as has been pointed out, would have remained in force until March 1, 1920.

Perhaps a tangible result could not be adduced from this element of value alone, but it nevertheless should have a bearing on the final amount to represent the loss. Vol. II, fols. 2502-2504.

It is submitted that the foregoing factors are important elements among others, in arriving at a fair value, under the circumstances here, and that the Circuit Court of Appeals erred in not giving due weight to these elements of value, and in substantially excluding them by its narrower rule based on estimated reproduction cost. A number of authorities support the consideration of such factors as have been enumerated. This Supreme Court, in *The Colorado*, 91 U. S. 692, *supra*, by affirming the lower court's decision in that case (decided

by Judge Longyear), at least tacitly approved the rule there followed, which was the broad rule originally expounded by Dr. Lushington in *The Iron Master*, Swab. 443, previously quoted. This Honorable Court also, in the *Minnesota Rate Cases*, 230 U. S. 433, approved the same rule now contended for, to the effect that "all relevant facts" must be taken into consideration in arriving at property values. The conclusions of District Judge Brown in the early case of *The Utopia*, 16 Fed. Rep. 507, p. 510, cited by the Commissioner, are to the same effect; also, *Leonard* v. *Whitwill*, 19 Fed. Rep. 547, p. 548. Circuit Judge Mack, sitting in the District Court for the Southern District of New York, ruled similarly, in the instant case, stating:

> "If evidence is adduced, indicating that the market price is not fair under the circumstances, then all other relevant facts should likewise be considered in determining fair value, unless indeed some positive form for ascertaining value is established by legislation. Cf. the rate regulation cases; Minnesota rate cases, 230 U. S. 352, 434.
>
> * * * * *
>
> "All the relevant facts should be considered."

Vol. II, fols. 2567-2568; *The Cushing-The Proteus*, 285 Fed. 617, pp. 619-620.

That broader and more flexible rule was applied by the Circuit Court of Appeals for the First Circuit, in *The H. F. Dimock*, 77 Fed. Rep. 226, p. 236; and, also, by the then Circuit Court of Appeals for the Second Circuit, in the earlier case of *La Normandie* (1893), 58 Fed. Rep. 427. *Ante*, Petition, pages 9-10.

Circuit Judge Putnam, in *The H. F. Dimock, supra*, at p. 235, after quoting from Williams and Bruce's Admiralty Practice (second edition), p. 97, to the effect

that "The Court will endeavor to arrive at the real extent of the loss sustained by calling to its aid every circumstance which may assist it to form a correct estimate", further stated that "All the elements to which we have referred as admissible concerning the valuation of articles" s uld be considered. P. 236.

Similarly, in the case of *La Normandie, supra,* the broad rule of taking into account all relevant factors was followed.

In the English case of *Harries* vs. *Shipping Comptroller,* 23 Comp. Cas. 308, 19 Asp. M. C. 320 (1918), the Court stated, at p. 310:

> "To ascertain the value it was necessary to take into consideration all the facts, and one of the most material facts was the fact that the ship at the time of the loss was under requisition."

See also *The Harmonides,* 1903, Prob. Div. 1, at p. 5; *Ante,* p. 19, as to force of English decisions. *The Eliza Lines,* 179 U. S. 119, p. 128.

On the other hand, if the rule which was applied by the District Court in the instant case, and which was invoked in the case of *The H. F. Dimock, supra,* in the First Circuit, should be deemed to be too flexible for application to the present case, which the petitioner does not concede, then, it is submitted, the fairer rule would be that as applied squarely by the Ninth Circuit in the case of the Samson, 217 Fed. Rep. 344, which Court looked only to the first cost of the vessel, and not to a fictitious "reproduction" cost.

In any event, the decisions on this important point as cited and stated in the foregoing Petition, pp. 9-10, show marked conflicts in the rulings and principles applied, which should be rendered uniform by a review of the instant case by this Honorable Court.

The foregoing factors have been discussed to illustrate and emphasize wide differences which must result from applying the broad rule adopted by the District Court, on the one hand, and the narrow rule used of the Circuit Court of Appeals, on the other hand.

The former has the support of a preponderance of the authorities, it is believed.

But, apart from the preferential merits of the two rules, conflicts as to the controlling legal principles applicable clearly exist among the several Circuit Courts of Appeals, as appears from the cases cited and distinguished in the foregoing petition, *ante*, pages 9 and 10. The cases there cited may be grouped by rules as follows:

(a) The broad rule of considering all relevant facts:

The H. F. Dimock, (C. C. A., 1st Circ., 1896), 77 Fed. Rep. 226; *La Normandie*, (C. C. A., 2d Circ., 1893), 58 Fed. Rep. 427.

(b) The first (original) cost rule, less depreciation for age:

The Samson (C. C. A., 9th Circ., 1914), 217 Fed. Rep. 347; *The J. E. Trudeau*, (C. C. A., 5th Circ., 1893), 54 Fed. Rep. 907; *Whitehurst* v. *United States*, (C C. A., 4th Circ., 1821), 272 Fed. Rep. 46.

(c) The rule of reproduction cost, less depreciation for age:

The Cushing, (C. C. A., 2d Circ., July 16, 1923. (Instant case).

It is submitted that the circumstances set forth above fully warrant the review of this case by this Honorable Court.

SECOND POINT.

THE SOUTHERN PACIFIC COMPANY, AS OWNER OF THE STEAMSHIP *Proteus*, IS DEBARRED FROM RECOVERING THE VALUE OF THE *Proteus* FROM THE PETITIONER, STANDARD OIL COMPANY (NEW JERSEY), IF THE SOUTHERN PACIFIC COMPANY HAS SETTLED ITS CLAIM FOR LOSS OF THE *Proteus* WITH THE DIRECTOR GENERAL OF RAILROADS, RAILROAD ADMINISTRATION, SINCE THE LATTER, AND STANDARD OIL COMPANY (NEW JERSEY) HAVE BEEN FOUND TO BE JOINT TORT FEASORS CAUSING THE LOSS.

The special circumstance which materially alters the original aspect of this litigation has been alleged in the Eleventh, Twelfth and Thirteenth Articles of the Petition, *ante*, pages 5, 6 and 7.

The *Proteus*, while being operated and navigated solely by the Director General of Railroads, and his servants, Vol. I, fols. 102 to 107; and the *Cushing*, operated and navigated by the Standard Oil Company, (New Jersey), came into collision, resulting in total loss of the *Proteus*. The collision and loss of the *Proteus* was found to have been caused by joint faults and acts of negligence on the part of the navigators of the *Proteus* and the *Cushing*. The Southern Pacific Company was not privy to the loss, and that fact having been established, the right to limit liability under the statutes was granted.

Indeed, there was not and is not any liability attachable to the Southern Pacific Company, which is the innocent injured party seeking only to recover for the value of the *Proteus*.

But the Director General of Railroads is liable, as the demise charterer in sole possession and control of the *Proteus,* and whose servants negligently contributed to the loss. *The Barnstable,* 181 U. S. 464.

Also, the Petitioner, Standard Oil Company (New Jersey) has been found to be a joint tort feasor with the Director General of Railroads, and jointly liable for the loss of the *Proteus.*

That definite position of each of the three parties forms the true legal relationship, and survives the somewhat incongruous situation brought about by the form of procedure followed to secure the benefit of the limitation of liability statutes.

If, then, as the Petitioner has unquestionably authoritative grounds for belief, the Southern Pacific Company has settled its claim for loss of the *Proteus* with the Railroad Administration (Director General of Railroads), i. e., one of the joint tort-feasors, the claim which it may have had for the same loss against the other tort feasor, Standard Oil Company (New Jersey) has thereby been extinguished. *Atlantic & Pacific RR. Co.* vs. *Laid,* 164 U. S. 393, 400; *Sessions* vs. *Johnson,* 95 U. S. 347; *The St. Cuthbert* (D. C., D. N. J., 1907), 157 Fed. Rep. 799, p. 800; *Miller* vs. *Tobacco Co.,* 7 Fed. Rep. 91; *Re Emma Silver Mining Co.,* 7 Fed. Rep. 401; *Bailey* vs. *Lundberg,* 49 Fed. Rep. 583; *Williford* vs. *Kansas City R. R.,* 154 Fed. Rep. 514.

It is a well settled rule of law that the release of a cause of action as against one of two or more joint tort feasors operates as a release of all, upon the theory that when one has received full compensation for a wrong, *no matter from which wrongdoer or from what source,* the law will not permit him to recover further damages. *Lovejoy* vs. *Murray,* 3 Wall. 17, 18; *O'Shea*

vs. *N. Y. C. & St. L. R. R. Co.*, 105 Fed. Rep. 559, 561 (Circuit Court of Appeals, 7th Circuit); *Hatzel* vs. *Moore*, 120 Fed. Rep. 1015, *Spurr* vs. *North Hudson Co. R. R. Co.*, 56 N. J. Law, 346; *American & English Encyclopedia of Law*, Second Edition, Volume 24, pp. 306, 307 and cases cited therein.

The better doctrine seems to be that even if in the release it is expressly stated that a claim is against one only of the tort feasors, nevertheless it operates as a matter of law to discharge all of the others, and the words of limitation are considered to be of no force as repugnant to the legal effect and operation of the instrument. *O'Shea* vs. *N. Y. C. & St. L. R. R. Co.*, 105 Fed. Rep. 559, 561; *Gunther* vs. *Lee*, 45 Md. 60; *Re Long* vs. *Curtis*, 35 Hun, 94; *Seither* vs. *Traction Co.*, 195 P. A. State, 397; 17 Atlantic 338, *Williams* vs. *Lebar*, 141 Pa. State 151.

Many courts go even further and state that if payment is made by one not liable and a release under seal is given, an action cannot be maintained against anyone who may be liable. This rule has been adopted in a number of states, although there are authorities against it. In support of the rule see *American English Encyclopedia of Law*, Second Edition, Volume 24, p. 308; *Leddy* vs. *Barney*, 139 Mass. 394; *Tompkins* vs. *Clay*, St. R. R. Co., 66 California, 166; *Denver R. R. Co.* vs. *Sullivan*, 21 *Colorado*, 302; Hartigan *vs. Dickson*, 81 Minn. 284.

As has been pointed out in the Petition, *Ante* page 7, the only procedure now open to the Petitioner to establish a right of relief under the condition now existing is through process obtainable only on a review of this cause by *certiorari.*

LAST POINT.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED, NOT ONLY BECAUSE OF THE ERRONEOUS AND CONFLICTING RULING ON THE VALUE OF THE PROTEUS, BUT ALSO BECAUSE OF THE SPECIAL CIRCUMSTANCE RELATED HEREIN WHICH WARRANTS TAKING OF PROOF AND CONSIDERATION AS TO ITS LEGAL EFFECT.

New York, October, 1923.

Respectfully submitted,

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CONTENTS.

	PAGE
Notice of Submission	i
Petition for Writ of Certiorari	1
Statement of Facts and Matters Involved	1
Reasons for Allowance of Writ	8
Brief in Support of Petition	13
Statement	13

FIRST POINT.

THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT ERRONEOUSLY APPLIED AN ARBITRARY AND INFLEXIBLE RULE OF DAMAGE, NOT JUSTIFIED BY THE FACTS, AND CONTRARY TO THE RULINGS OF OTHER CIRCUITS, AS WELL AS TO THE WEIGHT OF THE AUTHORITIES 15

1. *The abnormal, excessive, and transitory values affecting cost of contemporaneous ship construction* 19
2. *The comparatively low first cost of the* PROTEUS 21
3. *The considerable age of eighteen years and its obsolescent effect on the value of the* PROTEUS 22
4. *The special type and special use of the* PROTEUS *as a coastwise combined passenger and cargo vessel, and her comparative unfitness for trans-atlantic cargo carrying, or for general service* 23

PAGE

5. *The value placed on the* PROTEUS *by Southern Pacific Company* 23
6. *The insured value of the* PROTEUS..... 24
7. *Value as a going concern at the time of her loss* 25

SECOND POINT.

THE SOUTHERN PACIFIC COMPANY, AS OWNER OF THE STEAMSHIP *Proteus*, IS DEBARRED FROM RECOVERING THE VALUE OF THE *Proteus* FROM THE PETITIONER, STANDARD OIL COMPANY (NEW JERSEY) AND IF THE SOUTHERN PACIFIC COMPANY HAS SETTLED ITS CLAIM FOR LOSS OF THE *Proteus* WITH THE DIRECTOR GENERAL OF RAILROADS, RAILROAD ADMINISTRATION, SINCE THE LATTER, AND STANDARD OIL COMPANY (NEW JERSEY) HAVE BEEN FOUND TO BE JOINT TORT FEASORS CAUSING THE LOSS..... 29

LAST POINT.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED, NOT ONLY BECAUSE OF THE ERRONEOUS AND CONFLICTING RULING ON THE VALUE OF THE *Proteus*, BUT ALSO BECAUSE OF THE SPECIAL CIRCUMSTANCE RELATED HEREIN WHICH WARRANTS TAKING OF PROOF AND CONSIDERATION AS TO ITS LEGAL EFFECT..... 32

AUTHORITIES CITED.

PAGE

American & English Ency. of Law, 2nd Ed., Vol. 24, pp. 306, 307 31
Atlantic & Pacific RR. Co. vs. *Laird*, 164 U. S. 393, 400 30

Bailey vs. *Lundberg*, 49 Fed. Rep. 583..... 30
Barnstable, The (C. C. A. 2nd), 181 U. S. 464.... 30
Brown vs. *Calumet River Railway Co.*, 125 Ill. 600, 606 20

Colorado, The, 91 U. S. 692; Brown Adm. 411, Fed. Cas. No. 3029 ..... 24, 25
Cushing, The—The Proteus, 266 Fed. Rep. 570... 3
Cushing, The—The Proteus, 285 Fed. Rep. 617.3, 15, 26
Cushing, The—The Proteus, (C. C. A. 2nd Cir.) decided July 16, 1923 .....4, 9, 28

Denver RR. Co. vs. *Sullivan*, 21 Colorado, 302.... 31
Des Moines Gas Co. vs. *Des Moines*, 238 U. S. 153, 171, 172 20
Dimock, The H. F. (C. C. A. 1st), 77 Fed. Rep. 266 ..... 9, 26, 27, 28

Emma Silver Mining Co., In re, 7 Fed. Rep. 401.. 30

Galveston Electric Co. vs. *City of Galveston*, 272 Fed. Rep. 147, 157; 258 U. S. 388 20
Gunther vs. *Lee*, 45 Md. 60 31

Harmonides, The, 1903 Prob. Div. 1 ..... 23, 24, 25, 27
Harries vs. *Shipping Comptroller*, 14 Asp. M. C. 320 ..... 18, 27
Hartigan vs. *Dickson*, 81 Minn. 284 31
Hatzel vs. *Moore*, 120 Fed. Rep. 1015 31

PAGE

Iron Master, The, Swab. 443 ..... 24, 26

Kia Ora, The (D. C.) 246 Fed. Rep. 143 18

La Normandie (C. C. A. 2nd), 58 Fed. Rep. 427.. .....9, 10, 26, 27, 28
Lanquist vs. *City of Chicago*, 200 Ill. 69, 73..... 20
Lawrence vs. *Boston*, 119 Mass. 126, 128 20
Leddy vs. *Barney*, 139 Mass. 394 31
Leonard vs. *Whitewill*, 19 Fed. Rep. 547..... 26
Lines, The Eliza, 199 U. S. 119, 128..... 19
Long, In re vs. *Curtis*, 35 Hun. 94 31
Lovejoy vs. *Murray*, 3 Wall. 17, 18..... 30

Marsden on Collisions at Sea, 6th Ed., p. 119.... 25
Mersey Docks & Harbor Board and the Lords Commissioners of the Admiralty, 3 K. B. 1920.. 17
Miller vs. *Tobacco Co.*, 7 Fed. Rep. 91 30
Minnesota Rate Cases, 230 U. S. 352, 434..... 20, 26

O'Shea vs. *N. Y. C. & St. L. R. R. Co.* (C. C. A. 7th) 105 Fed. 559, 561 ..... 30, 31
Samson, The (C. C. A. 9th), 217 Fed. Rep. 344.... ..... 9, 10, 21, 27, 28
Samson, The (C. C. A. 9th), 208 Fed. Rep. 347... 21
San Francisco & Portland SS. Co. vs. *Scott*, 253 Fed. Rep. 854 ..... 22, 23
Seither vs. *Traction Co.*, 195 Pa. State, 397; 17 Atlantic, 338 31
Sessions vs. *Johnson*, 95 U. S. 347 30
Shipping Controller vs. *The Lloyd Royal Belge*, 1 L. L. R. 231, 389 K. B. D. Commercial Court, Nov. 1919 19
Spurr vs. *North Hudson RR. Co.*, 56 N. J. Law, 346 31
St. Cuthbert, The (D. C.), 157 Fed. Rep. 799..... 30

PAGE

Tompkins vs. *Clay St. R.R. Co.*, 66 California, 166 31
Trudeau, The J. E. (C. C. A. 5th), 54 Fed. Rep. 907 ..... 9, 10, 28

United States vs. *Sage*, 239 U. S. 57, 61 20
United States vs. *Standard Oil Co.*, 258 Fed. Rep. 696 23
Utopia, The, 16 Fed. Rep. 507, 510 26

Whitehurst vs. *United States* (C. C. A. 4th), 272 Fed. Rep. 46 ..... 9, 10, 28
Williams vs. *Lebar*, 141 Pa. State, 151..... 31
Williams & Bruce's Admiralty Practice, 2nd Ed., p. 97 26
Williford vs. *Kansas City RR.*, 154 Fed. Rep. 514 30